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No. 85-596

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. ARNSBERG, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, IRS special agents may be held personally liable, under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), for executing an arrest warrant that was subsequently held to be invalid.

2. Whether the agents' execution of the warrant constituted a state-law tort, thus rendering the United States liable under the Federal Tort Claims Act.

3. Whether, absent a waiver of sovereign immunity, the United States may be held directly liable for damages under *Bivens*.

4. Whether the Federal Tort Claims Act constitutes a waiver of the sovereign immunity of the United States with respect to constitutional torts under *Bivens*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A42) is reported at 757 F.2d 971. The opinion of the district court on liability (Pet. App. A97-A116) is reported at 549 F. Supp. 55. The opinion of the district court on damages (Pet. App. A91-A96) is unreported.

JURISDICTION

The opinion of the court of appeals, as modified on rehearing, was issued on April 9, 1985. A subsequent petition for rehearing was denied on May 30, 1985

(Pet. App. A43-A44). The judgment of the court of appeals was entered on June 10, 1985 (Pet. App. A88-A89). The petition for a writ of certiorari was filed on August 27, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner contends that two special agents of the Internal Revenue Service committed a state-law tort and violated his Fourth Amendment rights in executing an arrest warrant that was subsequently found to be invalid. On that basis, he seeks damages from the agents in their individual capacity under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), and from the United States under both *Bivens* and the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* The court of appeals held that summary judgment should be granted in favor of the agents and the United States in all respects.

1. Petitioner's name arose in connection with an IRS investigation into gambling activities in Portland, Oregon. Respondents Maney and Weiler, IRS special agents involved in the investigation, sought to obtain information from petitioner voluntarily, but petitioner declined to testify unless he was subpoenaed by a grand jury and stated that the agents would have to find him in order to serve a subpoena. In December 1979, the grand jury issued a subpoena requiring petitioner to appear on February 26, 1980. Despite their efforts, however, the agents were unable to serve this subpoena on petitioner, and petitioner did not appear before the grand jury on February 26. Pet. App. A4-A5, A129-A133.

Accordingly, the agents consulted the United States Attorney's office and explained the difficulties they

had encountered. Assistant United States Attorney Robinson concluded that a warrant should be obtained for the arrest of petitioner as a material witness pursuant to 18 U.S.C. 3149.[1] Pet. App. A5-A6. Based on an affidavit submitted by Agent Maney (*id.* at A129-A133), Robinson obtained an arrest warrant from a United States magistrate on February 27, 1985. The magistrate determined that the requirements for a material witness arrest warrant had been satisfied (*id.* at A6). However, although he correctly cited 18 U.S.C. 3149 as the statutory basis for the warrant, the magistrate, in describing the offense charged in the supporting affidavit, referred to a charge of failure to appear before the grand jury (Pet. App. A134). The agents later executed the warrant and arrested petitioner (*id.* at A7). Thereafter, petitioner successfully moved to quash the arrest warrant as invalid (*id.* at A136-A137).

2. After exhausting his administrative remedies under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, petitioner brought this action in the United States District Court for the District of Oregon. Contending that his arrest pursuant to the invalid warrant was both tortious under Oregon law and violative of the Fourth Amendment, petitioner sought damages from the individual agents under *Bivens* and from the United States under *Bivens* and the FTCA, 28 U.S.C. 2680(h).

On cross-motions for summary judgment, the district court granted judgment for the agents on the *Bivens* claim because they acted in good faith and thus were entitled to qualified immunity (Pet. App.

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[1] This provision, with minor changes not here relevant, is now codified at 18 U.S.C. (Supp. II) 3144.

A113-A115).[2] However, concluding that the arrest warrant was defective because of the absence of probable cause to believe that petitioner's presence could not be secured by subpoena (*id.* at A109-A112), the court ruled that petitioner's arrest was a state-law tort for which the United States was liable under the FTCA (*id.* at A107-A109); since this state-law tort gave rise to FTCA liability against the United States, it was unnecessary for the court to consider whether the United States could be directly liable under *Bivens* or whether the FTCA waived the government's sovereign immunity for constitutional torts. In a later opinion, the court awarded damages of $6,650 from the United States (*id.* at A91-A96).

3. On cross-appeals, the court of appeals affirmed the district court's grant of summary judgment in favor of the agents, and it reversed the summary judgment against the United States and ordered that judgment be entered for the government (Pet. App. A1-A42).

With respect to the *Bivens* claim against Agents Maney and Weiler, the court of appeals held that although the arrest warrant was in fact invalid because it failed to show probable cause that petitioner's grand jury appearance could not be obtained by subpoena (Pet. App. A12-A13), the agents had not acted unconstitutionally in executing it (*id.* at A28-A32). The court rejected petitioner's arguments that the agents should have known that the warrant was not

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[2] The district court's opinion was issued shortly after this Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). The district court, apparently applying pre-*Harlow* law, found that the agents had established their good faith and were entitled to summary judgment on their defense of qualified immunity (Pet. App. A113-A115).

validly issued in the circumstances of this case and should not have executed the warrant because of the facial discrepancy concerning the offense charged. Finding that the agents had "reasonably relied on the advice of counsel that the arrest was constitutional, and on the issuance of a warrant by a magistrate" (*id.* at A3), the court explained that it would be "plainly unreasonable" to require the agents to "take issue with the considered judgment of an assistant United States Attorney and the federal magistrate" and "at their own risk second-guess the legal assessments of trained lawyers" on questions of probable cause as to which "[r]easonable attorneys could disagree" (*id.* at A29-A30). The court also reasoned that the Constitution neither was violated by a facial discrepancy that was "not * * * serious" (*id.* at A30) nor "demand[ed] that arresting officers regularly scrutinize warrants for such technical discrepancies" (*id.* at A31). In addition, the court determined that the agents were entitled to qualified immunity both under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), because they had not violated a clearly established constitutional standard, and under pre-*Harlow* law, because they had reasonably believed in good faith that the arrest pursuant to the warrant was constitutional (Pet. App. A32-A34, A41-A42 n.10).

The court of appeals further held that petitioner was not entitled to damages from the United States. The court first ruled that the United States was not liable to petitioner under the FTCA for the alleged state-law tort.[3] Recognizing that 28 U.S.C. 2680(h) imposes liability on the government for false arrest or false imprisonment only "with regard to acts or

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[3] The court of appeals assumed but did not decide that petitioner's arrest was a tort under Oregon law (Pet. App. A15).

omissions of investigative or law enforcement officers of the United States Government,"[4] the court found that the IRS agents, as the "investigative or law enforcement officers" here, were not responsible for the invalid warrant on which the alleged tort was based. As the court explained (Pet. App. A21-A24), the uncontroverted facts showed that the agents had "acted nearly perfectly" in making "diligent attempts" to serve the subpoena on petitioner, in reporting to the United States Attorney's office the difficulties they encountered, and in submitting "an accurate affidavit to the magistrate";[5] that the discrepancy in the warrant concerning the offense charged was "a relatively minor and a relatively technical one," and the law did not "impose upon law enforcement officers like Weiler and Maney the obligation of scrutinizing arrest warrants for such minor discrepancies"; and that the agents "acted properly under the general common law." Rather, "the facts show that * * * [it was the magistrate who] made an erroneous determination of probable cause and thereby caused [petitioner] to be subject to an unreasonable seizure" (*id.* at A26). Concluding that "the district court erred in failing to limit its inquiry to whether the government law en-

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[4] Section 2680(h) defines "investigative or law-enforcement officer" to mean "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."

[5] The court rejected petitioner's contention that the affidavit was misleading, finding that it had "no such misleading tendency" (Pet. App. A22). In particular, the court found (as defense counsel and the magistrate had recognized, see *id.* at A147-A148) that the affidavit "made clear that the agents had not previously served the subpoena on [petitioner]" (*id.* at A22) and did not suggest that petitioner had a duty to appear before the grand jury in the absence of a subpoena.

forcement officers * * * acted tortiously," the court of appeals held that in this case those officers "committed no tort under Oregon [l]aw" (*id.* at A25). Accordingly, it ordered that summary judgment be entered for the government on this issue (*ibid.*).

Moreover, the court of appeals upheld the district court's ruling that the doctrine of sovereign immunity precluded the imposition of liability directly on the United States for constitutional torts (Pet. App. A25-A28). Although assuming that the United States would be liable under such a theory for the magistrate's legal error in issuing the arrest warrant (*id.* at A26), the court concluded that *Bivens* could not be extended to provide a cause of action against the United States in light of the government's sovereign immunity (*id.* at A27). The court did not decide whether the FTCA applies to constitutional as well as state-law torts, thus waiving the sovereign immunity of the United States with respect to such constitutional violations (*id.* at A35-A36 n.2).[6]

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[6] In its initial opinion, the court of appeals had concluded that there was a genuine issue of material fact as to whether the IRS agents had made deliberate misrepresentations to the Assistant United States Attorney and the magistrate; accordingly, it had remanded the case to the district court for further proceedings on both the *Bivens* claim against the agents and the FTCA state-law tort claim against the United States (Pet. App. A70-A71, A80). However, in response to respondents' petition for rehearing, the court revised its opinion and judgment; finding that the uncontroverted record provided no support for the assertion of deliberate misrepresentation, the court directed that judgment be entered for respondents on all counts (*id.* at A21-A22, A31-A34).

ARGUMENT

1. The district court rejected petitioner's *Bivens* claim against the individual respondents, holding that the agents were entitled to qualified immunity. The court of appeals agreed, and further concluded that the agents had committed no Fourth Amendment violation.

Petitioner asserts (Pet. 16-22) that the courts below misunderstood the factual record and that, as properly understood, it demonstrates that the agents were not entitled to qualified immunity because they acted in bad faith and their conduct violated clearly established constitutional standards. Petitioner's fact-bound contention does not warrant this Court's review, however, and in any event, for the reasons stated by the courts below, it is without merit. Indeed, both courts below were in agreement that the record was sufficiently clear and uncontroverted to justify summary judgment against petitioner in this regard.

As the court of appeals observed (Pet. App. A22), the IRS agents in this case "acted nearly perfectly." After their "diligent attempts" (*ibid.*) to serve the subpoena on petitioner proved unsuccessful, the agents consulted the United States Attorney's office and "accurately recounted the difficulties they [had] encountered" (*id.* at A32). An Assistant United States Attorney concluded that an arrest warrant was justified (*id.* at A6, A32), and pursuant to the Assistant's directions one of the agents submitted an "accurate affidavit" to the magistrate (*id.* at A22).[7] In subse-

[7] Petitioner's complaints about the accuracy of the affidavit were correctly rejected below. For example, Agent Maney's statement that petitioner "did not appear before the grand jury" does not imply that petitioner had any duty to appear;

quently executing the warrant issued by the magistrate, the agents were entitled to rely on the determinations by the magistrate and the Assistant United States Attorney that probable cause existed to arrest petitioner as a material witness (*id.* at A3); especially where, as here, "[r]easonable attorneys could disagree" on the question of probable cause (*id.* at A29), there is no requirement that agents "take issue with the considered judgment of an assistant United States Attorney and the federal magistrate" and "at their own risk second-guess the legal assessments of trained lawyers" (*id.* at A29-A30). Nor was the agents' conduct rendered unreasonable by the fact that the warrant contained a discrepancy between the statutory citation to the material witness arrest provision and the description of the offense as failure to appear before the grand jury; as the court of appeals correctly stated, this discrepancy was "minor" and "technical" (*id.* at A23; see also *id.* at A30), and "it is not constitutionally required * * * that arresting officers regularly scrutinize warrants for such technical discrepancies" (*id.* at A31).[8]

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on the contrary, the affidavit sets forth the agents' repeated but unsuccessful efforts to serve a subpoena on petitioner, and the magistrate surely understood, as he later expressly stated (Pet. App. A148), that petitioner had not been served. Agent Maney's statement that petitioner "would not cooperate" was also justified in light of petitioner's insistence on a subpoena rather than voluntary acceptance of a more informal arrangement and the agents' inability to locate petitioner for service of the subpoena even though their extensive efforts plainly afforded him reasonable notice that he was being sought. Finally, the statement that petitioner had not been to his store in a month was a fair conclusion based on the explanations that petitioner's employees gave the agents for his absence.

[8] *Malley* v. *Briggs*, No. 84-1586 (argued Nov. 13, 1985), presents the question whether a police officer who obtains an

Petitioner further argues (Pet. 14-16) that this Court should overturn its recent decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), to restore, at least in certain circumstances, the subjective "good faith" requirement for qualified immunity that existed prior to *Harlow*. However, petitioner has offered no reason for the Court to revisit this question or to reject the analysis that it unanimously adopted only four Terms ago.[9] See also *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), slip op. 18. And in any event, as the concurrent findings below establish, the agents here acted in good faith under the pre-*Harlow* standard (see page 4 note 2 & page 5, *supra*).

2. Petitioner also appears (Pet 18-24) to seek review of the court of appeals' holding that the United States was not liable under the Federal Tort Claims Act for the alleged state-law tort. Petitioner does not contest the court's ruling that, pursuant to the express language of 28 U.S.C. 2680(h), the United States is subject to liability for such torts only if they arise out of the "acts or omissions of investigative or law enforcement officers of the United States Government." See also *Ames* v. *United States*, 600 F.2d 183, 185 & n.3 (8th Cir. 1979); *Jaffee* v. *United States*,

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arrest warrant from a judge is subject to liability for executing the warrant on the ground that he knew or should have known that the facts recited in his affidavit did not establish probable cause. Because in the instant case the court of appeals held that the agents neither knew nor reasonably could have been expected to know that the warrant was invalid, this petition need not be held pending decision in *Malley* v. *Briggs*.

[9] We agree with petitioner (Pet. 15) that *Harlow* does not afford qualified immunity for violations of clearly established Fourth Amendment rules. But for the reasons already outlined, that proposition has no application to the present case.

592 F.2d 712, 716 n.6 (3d Cir.), cert. denied, 441 U.S. 961 (1979). Rather, focusing on the conduct of the IRS agents, petitioner argues that "[t]he same facts which defeat the good faith immunity of the agents also show that the agents acted tortiously" (Pet. 22).

For the reasons already discussed, petitioner's argument is without merit and does not call for further review. Even assuming that the warrant was not supported by probable cause and that petitioner's arrest pursuant to an invalid warrant was tortious under Oregon law (see Pet. App. A15), the dispositive fact is that the IRS agents acted properly and were not responsible for the tort. Rather, it was the "[m]agistrate * * * [who] made an erroneous determination of probable cause" in issuing the warrant (*id.* at A26). Because the alleged tort was not committed by the agents, the United States is not liable under Section 2680(h).

3. Petitioner also argues (Pet. 28-35) that under *Bivens* the United States should be directly liable in damages for violations of the Fourth Amendment. However, as the court below and other courts of appeals have recognized (see Pet. App. A27-A28),[10] principles of sovereign immunity prevent the United States from being sued without its consent. See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983);

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[10] See also *Keene Corp.* v. *United States*, 700 F.2d 836, 845 n.13 (2d Cir.), cert. denied, 464 U.S. 864 (1983); *Radin* v. *United States*, 699 F.2d 681, 684-685 (4th Cir. 1983); *Laswell* v. *Brown*, 683 F.2d 261, 268 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); *Jaffee*, 592 F.2d at 717-718.

United States v. *Testan*, 424 U.S. 392, 399-401 (1976).[11]

It is specious to argue, as petitioner does, that sovereign immunity is inapplicable where the government has exceeded its authority by acting unconstitutionally; that argument would essentially eviscerate the doctrine of sovereign immunity (cf. *Barr* v. *Matteo*, 360 U.S. 564, 572 (1959)) and has been rejected as a limitation on the immunity of the United States from suit. See *Butz* v. *Economou*, 438 U.S. 478, 504 (1978); *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976). Indeed, in *Testan*, the Court stated that not "all substantive rights of necessity create a waiver of sovereign immunity" (424 U.S. at 401) and that such a waiver must be found even where "the basis of the federal claim * * * [is] the Constitution" (*ibid.*). Likewise, *Testan* also rejected the argument suggested by petitioner here (Pet. 34-35) that the Court should "tamper with these established principles [of sovereign immunity] because it might be thought that they should be responsive to a particular conception of enlightened governmental policy" (424 U.S. at 400). Finally, the availability of monetary relief under the Tucker Act (28 U.S.C. 1346(a)(2), 1491)

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[11] Petitioner contends (Pet. 11, 28 n.4) that there is a conflict among the circuits on the issue whether the Fourth Amendment establishes a cause of action for damages against the United States. However, the cases on which he relies involve the question of suits for constitutional torts under the Federal Tort Claims Act (by which the government has waived sovereign immunity), not a direct claim under the Constitution regardless of sovereign immunity. We discuss the FTCA question at pages 13-16, *infra*; as to the constitutional issue, the court of appeals correctly noted (Pet. App. A27-A28) that the circuits are in accord in holding that the Fourth Amendment does not provide a direct damages action against the United States.

and the Just Compensation Clause of the Fifth Amendment does not, contrary to petitioner's argument (Pet. 33-34), establish that other constitutional provisions render the United States liable for damages irrespective of sovereign immunity; the Court so held in *Testan*, relying on the unique nature of the Just Compensation Clause in terms of its specific "language" and "purpose" requiring compensation and its "self-executing aspects" (424 U.S. at 401).

4. As demonstrated above, petitioner does not have a cause of action against the United States either under the Federal Tort Claims Act for the alleged state-law tort or directly under the Constitution for the violation of his Fourth Amendment rights. In an effort to circumvent the effect of those conclusions, petitioner argues (Pet. 24-27) that the 1974 amendment to 28 U.S.C. 2680(h) waives the government's sovereign immunity for constitutional torts and therefore that the United States is liable for the Fourth Amendment violation in this case.[12]

As petitioner acknowledges, this argument was squarely rejected in *Brown* v. *United States*, 653 F.2d 196, 199-201 (5th Cir. 1981), cert. denied, 456 U.S. 925 (1982). See also *Castro* v. *United States*, 775 F.2d 399, 405 (1st Cir. 1985); *Art Metal—U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1160 (D.C. Cir.

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[12] Of course, waivers of sovereign immunity must be strictly construed and may not be "enlarge[d] * * * beyond what the language requires." *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927). Rather, "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." *McMahon* v. *United States*, 342 U.S. 25, 27 (1951) (footnote omitted). "The appropriate inquiry * * * is whether Congress clearly and unequivocally" waived sovereign immunity. *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981).

1985); *Birnbaum* v. *United States*, 588 F.2d 319, 327-328 (2d Cir. 1978); Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Legis. 1, 4-5 (1979); cf. *Sellfors* v. *United States*, 697 F.2d 1362, 1365 (11th Cir. 1983), cert. denied, No. 82-1778 (July 2, 1984). Petitioner contends, however, that *Brown* is in conflict with *Norton* v. *United States*, 581 F.2d 390, 394-395 (4th Cir.), cert. denied, 439 U.S. 1003 (1978). For the reasons stated in our brief in opposition in *Brown* (No. 81-1200 (1981 Term)), a copy of which is being sent to counsel for petitioner, we submit that the decision in *Brown* is correct [13] and does not conflict with *Norton*.[14]

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[13] As discussed in our opposition in *Brown*, the 1974 amendment to Section 2680(h) was intended "to provide a remedy against the United States for the intentional torts of its investigative and law enforcement officers." S. Rep. 93-588, 93d Cong., 1st Sess. 1 (1973); see also *id.* at 3. As the Senate Report indicates, that remedy extends to intentional torts that are also violations of the Fourth Amendment. At the same time, the 1974 amendment, which the Department of Justice did not oppose (*id.* at 4), does not establish that the United States would be liable for constitutional violations that are *not* also state-law torts. On the contrary, 28 U.S.C. 1346(b) and 2674, which are incorporated by reference in the 1974 amendment (see 28 U.S.C. 2680(h)), specifically provide that the United States is liable only if a private person would be liable under the circumstances (see *United States* v. *Muniz*, 374 U.S. 150, 153 (1963)) in accordance with the law of the place where the tortious conduct occurred (see *Carlson* v. *Green*, 446 U.S. 14, 23 (1980)). Since a private party cannot violate the Constitution, and since state law provides the governing legal standard for liability, these statutory provisions make clear that the United States is not liable for a constitutional violation that is not a tort under local law.

[14] The "sole issue" in *Norton* was whether under the FTCA the United States could assert the immunity of its officials as

The issue of the applicability of the FTCA to constitutional torts and the asserted conflict between *Brown* and *Norton* were expressly presented in the petition for a writ of certiorari in *Brown*; the Court denied certiorari in *Brown*, and there is no reason for a different result here.[15]

Indeed, review would be particularly inappropriate in the circumstances of this case. First, neither court below addressed the matter (see Pet. App. A35-A36 n.2). Moreover, whatever kinds of torts are encompassed within Section 2680(h), that provision is ex-

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a defense to its own liability (581 F.2d at 391; see also *id.* at 393). In fact, the government did not contest the applicability of Section 2680(h) to the Fourth Amendment violation involved in that case (581 F.2d at 392). However, in describing the government's concession that Section 2680(h) was applicable there, the court commented that the 1974 amendment to that provision was "intended to waive the federal government's sovereign-immunity defense in suits brought to redress violations of the fourth amendment committed by federal law enforcement officers" (581 F.2d at 392-393; see also *id.* at 394-395 & n.8). It is that statement—which does not even refer to the issue of constitutional violations that are not also state-law torts—that is alleged by petitioner to conflict with *Brown*.

[15] We also note that Congress has considered bills to make the United States liable for constitutional torts. These bills reflect the settled understanding that Section 2680(h) does not extend beyond state-law torts and thus does not impose liability on the government for constitutional violations that are not also tortious under state law. See, *e.g.*, 125 Cong. Rec. 5274 (1979) (remarks of Sen. Kennedy); *Tort Claims: Hearing on H.R. 24, H.R. 3060, and H.R. 3799 Before the Subcomm. on Administrative Law and Governmental Operations of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 23, 24, 32 (1982) (statement of Deputy Attorney General Schmults); Bell, *supra*, 16 Harv. J. on Legis. at 10, 16.

pressly limited to those torts committed by "investigative or law enforcement officers of the United States Government." Since the constitutional violation here arose from the erroneous legal determination of probable cause by the magistrate and not from the acts of the IRS agents, liability could not be imposed on the United States regardless of whether Section 2680(h) subsumes constitutional torts as such, and hence the outcome of this case would be unaffected by the resolution of the issue that petitioner seeks to present.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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